In the Supreme Court

Appeal from the Michigan Court of Appeals
Donofrio, PJ, and Zahra and Kelly, JJ

JOANNE ROWLAND,

Plaintiff-Appellee,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellant,

and

NORTHFIELD TOWNSHIP,

Defendant.
_____/

Supreme Court Docket No. 130379

Court of Appeals Docket No. 253210

Washtenaw County Circuit Court
No. 03-128-NO

BRIEF ON APPEAL OF PLAINTIFF-APPELLEE JOANNE ROWLAND

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

Plaintiff-Appellee, Joanne Rowland, states that the Statement of Basis for Jurisdiction as set forth in Defendant-Appellant's, Washtenaw County Road Commission's, brief to this Court is complete and correct. MCR 7.306(A); 7.212(D)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER WELL SETTLED AND LONG-STANDING AUTHORITY FROM THIS COURT AS SET FORTH IN *HOBBS V MICHIGAN STATE HIGHWAY DEP'T*, 398 MICH 90, 96 (1976) AND REAFFIRMED IN *BROWN V MANISTEE CO RD COMM*, 452 MICH 354, 356-357 (1996), AS TO THE APPLICATION OF THE 120-DAY NOTICE PROVISION SET FORTH IN MCL 691.1404 SHOULD BE OVERRULED UNDER THE STANDARD FOR APPLYING STARE DECISIS, AS DISCUSSED IN *ROBINSON V CITY OF DETROIT*, 462 MICH 439, 463-468 (2000), WHERE *HOBBS* AND *BROWN* WERE CORRECTLY DECIDED, ALLOW FOR PRACTICAL WORKABILITY, AND WHERE OVERRULING THESE DECISIONS WOULD WORK AN UNDUE HARDSHIP BECAUSE OF THE THIRTY YEARS OF RELIANCE ON THIS JURISPRUDENCE AND THE EXPECTATIONS THAT HAVE RESULTED.**

Plaintiff-Appellee answers: No.

Defendant-Appellant answers: Yes.

II. **IF THIS COURT OVERRULES *HOBBS* AND *BROWN*, WHETHER THE DECISION SHOULD HAVE ONLY PROSPECTIVE APPLICATION UNDER THE STANDARD DISCUSSED IN *POHUTSKI V CITY OF ALLEN PARK*, 465 MICH 675, 695-699 (2002), WHERE THE DECISION WOULD CLEARLY ESTABLISH A NEW PRINCIPLE OF LAW AND 1) THE PURPOSE OF THE NEW DECISION – TO CORRECT AN ALLEGED ERROR IN THE INTERPRETATION OF A STATUTE – WOULD BE FURTHERED, 2) THERE HAS BEEN THIRTY YEARS OF EXTENSIVE RELIANCE ON *HOBBS'* AND *BROWN'S* INTERPRETATION OF THE STATUTE, AND 3) PROSPECTIVE APPLICATION WOULD MINIMIZE THE EFFECT OF THE DECISION ON THE ADMINISTRATION OF JUSTICE.**

Plaintiff-Appellee answers: Yes.

Defendant-Appellant answers: No.

III. **HAVING CONCLUDED THAT *HOBBS* AND *BROWN* SHOULD NOT BE OVERRULED OR, IF SO, THAT THE NEW DECISION SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT, WHETHER PLAINTIFF'S CLAIM IS BARRED AS UNTIMELY WHERE SHE PROVIDED NOTICE WITHIN 140 DAYS OF HER INJURY AND DEFENDANT SUFFERED NO ACTUAL PREJUDICE, AND WHERE THE CONTENTS OF PLAINTIFF'S NOTICE SATISFIED THE REQUIREMENTS OF MCL 691.1404, IN THAT IT ADEQUATELY APPRISED DEFENDANT OF THE LOCATION OF THE DEFECT AND ALLOWED DEFENDANT TO CONDUCT AN INVESTIGATION, AND WHERE PLAINTIFF'S FOIA REQUEST FOR PHOTOGRAPHS OF THE LOCATION MADE ON THE SAME DAY THAT NOTICE WAS PROVIDED FURTHER ALERTED DEFENDANT TO CONDUCT AN INVESTIGATION AND COLLECT EVIDENCE.**

Plaintiff-Appellee answers: No.

Defendant-Appellant answers: Yes.

The Court of Appeals majority answered: No.

The Circuit Court answered: No.

IV. **WHETHER GENUINE ISSUES OF MATERIAL FACT REMAIN FOR TRIAL AS TO WHETHER PLAINTIFF'S INJURY OCCURRED ON THE IMPROVED PORTION OF THE ROADWAY DESIGNED FOR VEHICULAR TRAVEL WHERE PLAINTIFF'S TESTIMONY STATES AS MUCH, AND PHOTOGRAPHS TAKEN OF THE AREA SUPPORT PLAINTIFF'S TESTIMONY, SUCH THAT REASONABLE MINDS COULD FIND IN FAVOR OF PLAINTIFF.**

Plaintiff-Appellee answers: Yes.

Defendant-Appellant answers: No.

The Court of Appeals majority answered: Yes.

The Circuit Court answered: Yes.

COUNTER-STATEMENT OF FACTS

A. Plaintiff's Injury

At about 8:30 a.m. on February 6, 2001, Plaintiff was taking her regular morning walk along Main Street in the city of Whitmore Lake. Plaintiff walked into the crosswalk as she approached the intersection of Main and Jennings Street, and stepped into a pothole or depression that was filled with water causing her to fall. (App. at 45a, 57a, 61a-63a, 132a; App. at 2b). An ambulance was called to the scene, and Plaintiff was transported to the hospital. (App. at 45a, 132a)

As a direct and proximate result of the fall, Plaintiff suffered a broken tibia and a broken fibula (a broken leg). (App. at 45a, 132a). Plaintiff underwent surgery at which time hardware with screws and steel plates were permanently placed into her leg in order to repair the broken bones. (App. at 45a, 132a)

Shortly after her injury, Plaintiff had photographs taken of the area which depict the depressions and potholes in which she fell. (App. at 45a, 61a-63a, 132a). The potholes and depressions were filled with water thereby preventing Plaintiff from determining the depth of the holes by observation. (App. at 45a, 61a-63a, 132a).

B. Plaintiff's Notice Provided to Defendant

On June 26, 2001, immediately after being retained, Plaintiff's counsel sent notice pursuant to MCL 691.1404 to Defendant informing it of Plaintiff's injury, the location where the injury occurred, the cause of the injury, Plaintiff's continued investigation into the matter, and Plaintiff's intention to pursue a claim for money damages. (App. at 42a, 45a, 134a). Also on June 26, 2001, Plaintiff's counsel sent a Freedom of Information Act ("FOIA") request to Defendant asking that it "produce or make available for viewing and copying, any photo logs or

video logs maintained by the Washtenaw County Road Commission showing the intersection of Jennings and Main Street." (App. at 46a, 65a, 134a). Defendant did not respond to the FOIA request until July 12, 2001, at which time Defendant indicated that no photo logs were available, but Defendant "believed" that there existed a single shot of "Jennings Road taken from Main Street" at least twenty years ago. (App. at 46a, 68a, 134a). Also in July of 2001, Defendant resurfaced the area in question knowing that it had notice of a possible compensatory injury having occurred there, and knowing that it did not have photo logs of the area. (App. at 138a).

C. Plaintiff's Lawsuit and Course of Proceedings Below

On February 5, 2003, Plaintiff filed the instant suit against Defendant. (App. at 1b-4b). Plaintiff sought damages for the injuries that she sustained as a result of falling into the hole located in the shoulder crosswalk of the intersection at Jennings and Main Street in Northfield Township. (App. at 2b)

Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (10) raising three arguments for dismissal. (App. at 9a-11a, 12a-42a). Specifically, Defendant argued that Plaintiff's claim was barred by the Natural Accumulation Doctrine, (App. at 15a-17a); that Defendant had no notice of the alleged defect pursuant to MCL 691.1403, (App. at 17a-18a); and that the notice provided by Plaintiff did not comply with MCL 691.1404. (App. at 18a-19a). Plaintiff filed a response brief to Defendant's motion for summary disposition, arguing that the motion should be denied. (App. at 43a-79a).

On November 19, 2003, the trial court held a hearing on Defendant's motion, and denied the motion noting on the record that, although Plaintiff's notice was untimely, it was adequate and that Defendant suffered no actual prejudice. (App. at 98a) The court also rejected Defendant's argument that questions of fact did not remain as to whether Plaintiff's injury

occurred in the crosswalk of the roadway. (App. at 98a). The trial court entered its Order Denying Defendant's Motion for Summary Disposition, (App. at 100a), and Defendant appealed to the Michigan Court of Appeals.

On appeal, for the first time Defendant challenged the continued validity of this Court's decision in *Brown v. Manistee Road Commission*, 452 Mich 354; 550 NW2d 215 (1996), wherein the Court reaffirmed its decision in *Hobbs v Michigan State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976), that absent a showing of actual prejudice to the governmental agency, the notice provision is not a bar to claims filed pursuant to the exceptions to governmental immunity. (App. at 115a-116a). Defendant also argued that the trial court erred in holding that Defendant did not suffer actual prejudice as a result of any inadequacy in Plaintiff's notice. (App. at 117a-118a). And, finally, Defendant argued that the court erred in finding that genuine issues of material fact remained for trial as to whether Plaintiff slipped on a "natural accumulation" and whether her injury occurred in the improved portion of the highway. (App. at 119a-125a).

On December 13, 2005, the Court of Appeals affirmed the trial court's order denying Defendant's motion for summary disposition. (App. 143a-146a). The Court rejected Defendant's invitation to disregard *Hobbs* and *Brown*, and held that "because defendant, both below and on appeal, failed to articulate any facts establishing actual prejudice, we cannot conclude the trial court erred in denying defendant summary disposition" based on any inadequacy with Plaintiff's notice.[1] (App. at 144a). The Court also rejected Defendant's arguments that it was immune from liability based on the natural accumulation doctrine, or based

[1] In a separate concurring opinion, Judge Kelly indicated she disagreed with the holdings of *Hobbs* and *Brown*, but recognized that the Court was duty-bound to follow Supreme Court precedent. (App. at 146a).

on Plaintiff's alleged failure to create a question of fact as to whether she fell in the improved portion of the roadway. (App. at 145a).

D. Defendant's Application for Leave to this Court

Defendant sought leave to appeal to this Court for the purpose of, among other things, challenging the validity of the well settled precedent of *Hobbs* and *Brown*. On March 31, 2006, this Honorable Court granted Defendant's application for leave to appeal, and specifically ordered the parties to include among the issues to be addressed: "(1) whether appellant's proposed overruling of *Hobbs v Michigan State Highway Dep't*, 398 Mich 90, 96 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357 (1996), is justified under the standard for applying stare decisis discussed in *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000); and (2) if so, whether a decision overruling *Hobbs* and *Brown* should have retroactive or prospective application under the standard discussed in *Pohutski v City of a Allen Park*, 465 Mich 675, 695-699 (2002)." (App. at 5b)

ARGUMENT

I. WELL SETTLED AND LONG-STANDING AUTHORITY FROM THIS COURT AS SET FORTH IN *HOBBS V MICHIGAN STATE HIGHWAY DEP'T*, 398 MICH 90, 96 (1976) AND REAFFIRMED IN *BROWN V MANISTEE CO RD COMM*, 452 MICH 354, 356-357 (1996), AS TO THE APPLICATION OF THE 120-DAY NOTICE PROVISION SET FORTH IN MCL 691.1404 SHOULD NOT BE OVERRULED UNDER THE STANDARD FOR APPLYING STARE DECISIS, AS DISCUSSED IN *ROBINSON V CITY OF DETROIT*, 462 MICH 439, 463-468 (2000), WHERE *HOBBS* AND *BROWN* WERE CORRECTLY DECIDED, ALLOW FOR PRACTICAL WORKABILITY, AND WHERE, OVERRULING THESE DECISIONS WOULD WORK AN UNDUE HARDSHIP BECAUSE OF THE THIRTY YEARS OF RELIANCE ON THIS JURISPRUDENCE AND THE EXPECTATIONS THAT HAVE RESULTED.

A. Standard of Review

Plaintiff states that the standards of review as set forth in Defendant's brief as to statutory construction, issues of law, and the denial of summary disposition are correct and complete. MCR 7.306(A); 7.212(D)(2).

B. The Continued Viability of *Hobbs* As Well As *Brown* are at Issue in this Case and Must Not be Disturbed

At the outset, Plaintiff emphasizes a glaring omission in Defendant's brief to this Court. That is, in seeking to have this Court overrule long-standing precedent, conspicuously absent from Defendant's brief is any meaningful reference to the fact that ten years ago, in *Brown v Manistee Road Commission*, 452 Mich 354; 550 NW2d 215 (1996), this Court was called upon to decide the continued viability of the principle first announced in *Hobbs v Michigan State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976) as to the notice requirement of MCL 691.1404, and reaffirmed that the failure to comply with the 120-day notice provision does not preclude an otherwise timely filed complaint so long as the defendant is not prejudiced. This Court does not lightly overrule binding precedent, and Defendant's myopic focus on *Hobbs* along with its failure to provide this Court with any meaningful discussion of *Brown* serves no useful purpose in the

decisional process, particularly with respect to an issue this Court ordered the parties to address in granting leave to appeal – whether appellant's proposed overruling of *Hobbs* and *Brown* is justified under the standard for applying stare decisis discussed in *Robinson v City of Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000).

With that said, a meaningful analysis of both *Hobbs* and *Brown* under the *Robinson* standard as set forth below, clearly shows that this Court should adhere to the categorical rule of stare decisis in statutory construction cases and not disturb this precedent.

C. Application of the *Robinson* Standard to *Hobbs* and *Brown* Demonstrates that These Cases Are Not of the Type for Which Exception to the Principle of Stare Decisis Applies

In *Robinson* this Court recognized that "[s]tare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson*, *supra* at 463 (citation and internal quotation marks omitted). To that end, "[w]hile stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in [a court's] past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v Hillery*, 474 U.S. 254, 265-266 (1986) quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting). The *Robinson* Court therefore set forth factors to be considered when deciding whether to overrule precedent, including: 1) whether the earlier case was wrongly decided, 2) whether he decision defies "practical workability," 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision.

1. *Hobbs* and *Brown* were correctly decided.

Under what is commonly known as the highway exception to governmental immunity, the Michigan Legislature has allowed for governmental agencies to be sued when "[a] person [] sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel . . . ." MCL 691.1402. The injured person proceeding with a claim under Section 1402, is required, "within 120 days from the time the injury occurred, . . . [to] serve a notice on the governmental agency of the occurrence of the injury and the defect." MCL 691.1404. Notably, however, the statute of limitations period for a claim brought against a county road commission is two years. MCL 691.1411(2).

In *Hobbs*, this Court considered the highway exception to governmental immunity in the context of whether to apply the limitations period set forth in the governmental liability act, MCL 691.1411(2), or whether to apply the limitations period set forth in the Court of Claims Act, MCL 600.6431(1). The Court concluded that the two-year limitations period of Section 1411(2) applied, and then considered whether the 120-day notice provision of Section 1404 could serve as a bar to claim otherwise timely filed under the 2-year statute. *Hobbs*, *supra* at 94-95.

The *Hobbs* Court looked to *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), wherein the Court upheld the notice requirement of the Motor Vehicle Accident Claims Act, and recognized *Carver's* admonishment that such notice requirements do not necessarily violate the constitution so long as the lack of notice does not bar an otherwise valid claim absent actual prejudice. In this regard, the Court further recognized *Carver's* rationale that

> "statutes which limit access to the courts by people seeking redress for wrongs are not looked upon with favor by us. We

> acquiesce in the enforcement of statutes of limitation when we are not persuaded that they unduly restrict such access, but we look askance at devices such as notice requirements which have the effect of shortening the period of time set forth in such statutes." [*Hobbs, supra,* quoting *Carver, supra*].

The Court concluded that the rationale of *Carver*, was "equally applicable to cases brought under the governmental liability act," and therefore held that "absent a showing of [actual] prejudice the notice provision of MCLA 691.1404 is not a bar to claims filed pursuant to MCLA 691.1402." *Hobbs, supra* at 96..

Twenty years later, in *Brown v Manistee County Road Commission*, 452 Mich 354, 356; 550 NW2d 215 (1996), this Court granted leave to appeal to consider, among other things, "whether [the Court's] rule in *Hobbs v Michigan State Hwys Dep't*, 398 Mich 90; 247 NW2d 754 (1976), requiring a showing of prejudice, should be overruled." In response to this question, the Court "reaffirm[ed] [its] decision in *Hobbs*, wherein this Court held that, absent a showing of actual prejudice to the governmental agency, the notice provision is not a bar to the claim." *Brown, supra.*

Tellingly, this Court based its decision not to overrule *Hobbs* primarily on the doctrine of stare decisis, with considerations of legislative acquiescence, and concluded that "more injury would result from overruling it than from following it." *Id.* at 365-67. Specifically, the Court opined:

> [T]he doctrine of stare decisis mandates [*Hobbs'*] reaffirmance. Additionally, despite the Legislature's ability to change the statutory language or disapprove of this Court's interpretation of § 4, it has acquiesced in the *Hobbs* decision for nearly twenty years.
>
> This Court has stated on many occasions that under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed. Further, this Court has stated that it will not overrule a decision deliberately made unless [it] is convinced not

> merely that the case was wrongly decided, but also that less injury would result from overruling than from following it.
>
> Moreover, this Court has consistently opined that, absent the rarest circumstances, we should remain faithful to established precedent. . . .
>
> With these principles in mind, we do not believe that *Hobbs* should be overruled. . . .
>
> We are not convinced that *Hobbs* was wrongly decided. Further, we believe that more injury would result from overruling it than from following it. The rule in *Hobbs* has been an integral part of this state's governmental tort liability scheme for almost two decades. It should not lightly be discarded. Although the law of governmental tort liability in this state has changed over the years, the continued validity of the *Hobbs* rule will not result in injustice. Rather, a reaffirmance of the rule will maintain the uniformity, certainty, and stability in the law of this state. [*Brown*, *supra* at 365-366 (footnote, citations and internal quotation marks omitted)].

The rationale espoused by the *Brown* Court in affirming *Hobbs* has even greater force today, where the Legislature has had an additional decade to change the statute in the wake of these decisions, but instead has chosen to remain silent and acquiesce to the Court's interpretation. And such thirty-year legislative acquiesce should not be taken lightly. In the context of cases involving statutory interpretation, stare decisis is considered the "categorical rule." *Rasul v Bush*, 542 US 466, 488 (2004) (Scalia, J., dissenting). Indeed, in *Shepard v United States*, 544 US 13; 125 S Ct 1254 (2005), the United States Supreme Court found that there was no sufficient justification for upsetting precedent interpreting the Armed Career Criminal Act (ACCA), *Taylor v United States,* 495 US 575 (1990). The Court noted that the issue dealt with an issue of statutory interpretation, and that time had further enhanced the usual precedential force of such a decision, as nearly fifteen years had passed since the decision had come down, and there had been no action by Congress to modify the ACCA as subject to the decision's understanding. *Shepard, supra* at 1259-1261 (Souter, J., joined by Stevens, Scalia, Ginsburg, and Thomas, JJ.)

Specifically, the Court reiterated the significance of stare decisis in the context of statutory interpretation, based on legislative power to alter the Court's interpretation if incorrect:

> There is not, however, any sufficient justification for upsetting precedent here. We are, after all, dealing with an issue of statutory interpretation, *see, e.g., Taylor*, 495 U.S., at 602, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173, (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."). **In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to our understanding** that it allowed only a restricted look beyond the record of conviction under a nongeneric statute. [*Shepard, supra* (emphasis added)].

Such is the case in the matter at hand where this Court has twice found in favor of interpreting the notice provision of 1404 as not serving as a bar to an otherwise valid claim absent actual prejudice, and for thirty years the Legislature has not taken any action to modify the Court's understanding. *Shepard, supra*; see also *IBP, Inc. v. Alvarez*, ___ US ___; 126 S Ct 514, 519 (2005) ("Considerations of stare decisis are particularly forceful in the area of statutory construction, especially when [the] interpretation of a statute has been accepted as settled law for several decades.").

Indeed, when the Michigan Legislature disagrees with this Court's interpretation of a statute, it has been quick to take corrective measures. For example, in *Smith v Globe Life Insurance Co*, 460 Mich 446, 467; 597 NW2d 28 (1999), this Court held that when giving effect to both MCL 445.904(1) and MCL 445.904(2), private actions are permitted against an insurer pursuant to MCL 445.911 of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*, regardless of whether the insurer's activities are "specifically authorized." The Court reasoned that "[a]lthough § 4(1)(a) generally provides that transactions or conduct 'specifically

authorized' are exempt from the provisions of the MCPA, § 4(2) provides an exception to that exemption by permitting private actions pursuant to § 11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code." *Id.* Within a year, in obvious response to this Court's ruling in *Smith*, the Michigan Legislature amended the MCPA, by omitting the section the Court found to allow for the private cause of action arising out of misconduct made unlawful by chapter 20 of the insurance code. See 2000 PA 432; see also MCL 445.904, 2000 PA 432 historical notes. Thus, in this case, the Legislature's thirty-year silence as to *Hobbs'* and *Brown's* interpretation of MCL 691.1404's notice provision actually speaks volumes.

In addition, both *Hobbs* and *Brown* were properly decided when considering principles of statutory construction. This Court's primary purpose when interpreting a statute is "to give full effect to the intent of the Legislature." *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 411; 596 NW2d 164 (1999). To reach this goal, this Court has recognized the rule that "statutes relating to the same subject matter should be read and construed together to determine the Legislature's intent," meaning that such statutes must be read *in pari materia*. *Id.* at 416. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times. "The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject." *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994) (citation and internal quotation marks omitted).

Thus, when interpreting § 1404's notice provision as to a claim brought under the highway exception provision, this Court must consider the statute of limitations period for such a claim, MCL 691.1411(2), and read the statutes together so as to render a harmonious result. If

this Court interprets § 1404 as barring any claim not in strict compliance with the 120-day notice provision, regardless of whether prejudice results to the governmental agency, then § 1411(2) is rendered meaningless surplusage and nugatory. Such a result contravenes the legislative intent and therefore provides further support for the holdings of *Hobbs* and *Brown.*

2. *Hobbs* and *Brown* do not defy practicable workability.

The holding of *Hobbs* and *Brown* as to an untimely notice of under §1404 as not precluding an otherwise timely claim under the highway exception to governmental immunity does not defy practicable workability. The courts have dealt with the issue, and indeed have ruled in favor of governmental entities on the issue of actual prejudice. For example, in *Lampkin v City of Detroit*, 2001 Mich App Lexis 2263, *2-*3 (Jan. 23, 2001), (App. at 19b), the Court of Appeals affirmed the trial court's ruling that the defendant had made sufficient showing of actual prejudice where the plaintiff did not provide actual notice to the defendant until filing suit seven months after the accident occurred, the complaint misstated the location of accident, the plaintiff was slow and inconsistent in his discovery responses, and the area had changed thereby depriving defendant of the ability to take accurate photographs. Thus, the issue of whether actual prejudice was demonstrated has been addressed by the courts as any other issue is addressed, and at times has lended itself to summary disposition both in favor of the plaintiff as well as in favor of the defendant. There simply is no problem with the practical workability of the rule of *Hobbs* and *Brown*. Compare *Robinson*, *supra* at 466 & n9.

3. Reliance interests weigh in favor of allowing *Hobbs* and *Brown* to stand.

In considering the reliance interests in the stare decisis paradigm, the Courts must decide "whether the previous decision(s) have become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-

world dislocations." *Id.* at 466. In the context of the area of the law that is statutory, the words of the statute itself are looked to for guidance:

> It is the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statue are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. [*Robinson*, *supra* at 467]

Here, the words of § 1404 are clear to the extent that they require the injured person, within 120 days from the time of the injury, to serve notice on the governmental agency of the injury and defect. See MCL 691.1404. However, the words of MCL 691.1411(2) are also clear that statute of limitations period for a claim brought against a county road commission is two years. Thus, in reading these two statutes together, society should be able to rely on the fact that it has two years in order to bring such a claim, inasmuch as the 120-day notice provision does not inform an actor that the failure to timely comply with its commands renders the 2-year statute of limitations nugatory. And indeed, for thirty years society as well as the courts have relied upon the rule of *Hobbs* and *Brown* that absent actual prejudice to the defendant, the failure to comply with the 120-day notice provision does not serve to defeat an otherwise valid claim. Thus, *Hobbs* and *Brown* have become "so embedded, so accepted, so fundamental, to everyone's expectations" that to change it would produce an undue hardships and real-world dislocations to the extent that it would be extremely improvident for this Court to overrule them. See *Robinson*, *supra* at 466 (noting that when consideration of the reliance interests "is in practice a prudential judgment for a court").

4. There are no changes in the law or facts to indicate that *Hobbs* and *Brown* are no longer justified.

Defendant argues at length in its brief that this Court's decision in *Ross v Consumers Power*, 420 Mich 567; 363 NW2d 641 (1984) commands that *Hobbs* be overruled. As is the case

with much of Defendant's arguments, it fails to inform the Court that in previously deciding whether *Hobbs* should be overruled, the *Brown* majority rejected the dissent's position that *Hobbs* was not loyal to *Ross*. *Brown*, *supra* at 372 (Riley, J., dissenting). After Defendant's passing acknowledgment made more than 30 pages into its brief that "*Brown* was decided after *Ross*," it then attempts to find justification for its position by claiming that in light of this Court's decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), *Brown* was wrongly decided because *Nawrocki* reaffirmed the principles of *Ross*. Defendant's circular reasoning is unavailing. As demonstrated below, the advent of *Nawrocki* does not weigh in favor of this Court deviating from the rule of stare decisis. Indeed, just as this Court was not persuaded that *Ross* weighed in favor of overruling *Hobbs* under a stare decisis analysis, it should not be persuaded that *Nawrocki* weighs in favor of overruling *Brown* on this basis either.

In *Nawrocki*, this Court espoused two rules related to the highway exception. First, the highway exception protects pedestrians who are injured by the defendant state or county road commission's failure to repair and maintain the improved portion of the highway designed for vehicular travel. *Nawrocki*, *supra* at 184. Second, the highway exception does not permit "signage" claims. That is, the state and country road commissions owed no duty to install, maintain, repair, and improve traffic control devices. *Id.* In overruling precedent that ran counter to these rules, the Court acknowledged the deference and "respect" to be paid to stare decisis: that it should not overrule precedent lightly, and that it should only do so when "'less injury will result from overruling that from following it.'" *Id.*, quoting *People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998). The *Nawrocki* Court stated that its decision for taking the extraordinary step away from stare decisis was "reinforced" by the provisions of other statutes that expressly set forth the duty of the state and local highway commissions to as to traffic control devises and

signage, and found that prior precedent that imposed a greater obligation on the state and local highway commissions had no basis and should therefore be overruled. *Id.* at 181-182, citing MCL 257.609(a); MCL 257.610(a). Said differently, the Court found that its prior precedent did not allow for the highway exception to be read *in pari materia* with other statutory provisions dealing with the same subject matter.

In this case, however, it is the holdings of the precedent at hand, *Hobbs* and *Brown*, that allow for a harmonious reading of § 1404 as well as § 1411(2), and thus the rationale of *Nawrocki* works in favor of this Court adhering to the categorical rule of state decisis. Moreover, to the extent that *Nawrocki* embraced the basic principle of *Ross*, that exceptions to governmental immunity be narrowly construed, *Hobbs* and *Brown* do not run afoul of this principle where requiring a county road commission to show actual prejudice by way of an untimely notice provision does nothing to broaden any substantive duty on the part of the commission such as that found impermissible in *Nawrocki*.

In summary, all of the *Robinson* factors attendant to an analysis of whether this Court should deviate from the rule of stare decisis and overrule *Hobbs* and *Brown*, weigh against the Court doing so. Indeed, *Hobbs* was correctly decided thirty years ago, and *Brown* correctly reaffirmed *Hobbs* ten years ago; moreover, beyond the correctness of these decisions, there remains no basis to depart from them, and to do so would result in far more harm than good. See *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904).

II. IF THIS COURT OVERRULES *HOBBS* AND *BROWN*, THE DECISION SHOULD HAVE ONLY PROSPECTIVE APPLICATION UNDER THE STANDARD DISCUSSED IN *POHUTSKI V CITY OF ALLEN PARK*, 465 MICH 675, 695-699 (2002), WHERE THE DECISION WOULD CLEARLY ESTABLISH A NEW PRINCIPLE OF LAW AND 1) THE PURPOSE OF THE NEW DECISION – TO CORRECT AN ALLEGED ERROR IN THE INTERPRETATION OF A STATUTE – WOULD BE FURTHERED, 2) THERE HAS BEEN THIRTY YEARS OF EXTENSIVE RELIANCE ON *HOBBS'* AND *BROWN'S* INTERPRETATION OF THE STATUTE, AND 3) PROSPECTIVE APPLICATION WOULD MINIMIZE THE EFFECT OF THE DECISION ON THE ADMINISTRATION OF JUSTICE.

A. Standard of Review

Plaintiff states that the standards of review as set forth in Defendant's brief as to statutory construction, issues of law, and the denial of summary disposition are correct and complete. MCR 7.306(A); 7.212(D)(2).

B. Although *Hobbs* and *Brown* Should Not be Overruled, A Decision to do so Should Solely be Applied Prospectively

"[W]here injustice might result from full retroactivity," such as when a holding "overrules settled precedent," the new decision "may properly be limited to prospective application." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), citing *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). Indeed, this Court has acknowledged that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy," *Riley v. Northland Geriatric Center (After Remand)*, 431 Mich. 632, 644; 433 NW2d 787 (1988), such that "'[i]n each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change.'" *Id.*, quoting *Placek v Sterling Heights*, 405 Mich 638, 665; 275 NW2d 511 (1979), *reh den* 406 Mich 1119 (1979).

The threshold question to be asked when determining retrospective-prospective application is whether the decision clearly establishes a new rule of law. *Pohutski, supra* at 696, citing

Chevron Oil v Hudson, 404 US 97, 106-107; 92 S Ct 349 (1971). If this threshold question is answered affirmatively, then the fairness question is answered by weighing three factors: "1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.*; see also *Riley*, *supra* at 645-646.

In this case, any decision to overrule *Hobbs* and *Brown* would undoubtedly set forth a new principle of law that contravenes thirty-year precedent and reliance thereon, so as to adversely affect the administration of justice. As a result, any such decision must be given only prospective application.

1. A decision overruling *Hobbs* and *Brown* would set forth a new rule of law.

In the context of deciding whether the new decision establishes a new principle of law, courts must look to whether the decision "overrul[es] clear past precedent on which litigants may have relied, or [] decide[es] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, *supra* at 106.

The *Pohutski* Court made such an inquiry in determining whether its decision to overrule *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988) and cases allowing for a trespass-nuisance exception to governmental immunity, should be applied retroactively or prospectively. *Pohutski*, *supra* at 696-697. The Court found that

> [a]lthough this opinion gives effect to the intent of the Legislature that may be reasonably be [*sic*] inferred form the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in *Hadfield* and *Li [v Feldt (After Remand)*, 434 Mich 584, 592-594; 456 NW2d 55 (1990)]. [*Pohutski*, *supra* at 697 (citations omitted)].

Indeed, the Court undertook an extensive review of the Government Tort Liability Act, in determining whether § 7 thereto, MCL 691.1407, permitted a trespass-nuisance exception as

found in *Hadfield*, and concluded that the plain language of the statute did not. *Id.* at 700. Despite the fact that the Court found the language of § 1407 to be plain and unambiguous, the Court nonetheless found that its decision to enforce the language as written espoused a new rule of law in light of the case law such as *Hadfield* that held to the contrary. *Id.* And ultimately, the *Pohutski* Court held that its new decision should be limited to prospective application. *Id.* at 697.

The same reasoning would apply to the instant case. That is, should this Court hold that the plain language of § 1404 requires strict compliance with the 120-day notice rule regardless of whether actual prejudice to the defendant results, that holding, practically speaking, would set forth a new principle of law in light of, what this Court would consider, *Hobbs'* and *Brown's* erroneous interpretations. See *id.*; see also *Riley*, *supra*; *Chevron*, *supra* at 107 ("[W]e conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act.") Thus, because a decision overruling *Hobbs* and *Brown* would create a new principle of law in this state, the Court must look to the following fairness factors. *Pohutski*, *supra* at 697.

This Court should not be persuaded otherwise by Defendant's attempt to portray *Hobbs* as a single prior decision "standing alone" so as to minimize its significance in the jurisprudence. As Plaintiff has emphasized, Defendant's myopic focus on *Hobbs* does nothing to erase this Court's decision in *Brown*, decided twenty years after *Hobbs*, from the jurisprudence. Likewise, Defendant's attempt to portray *Hobbs* has "constantly evolving" or "fractured" in an effort to minimize its force, flies in the face not only of *Brown*, but of the body of law that has

consistently applied these decisions. Notably, Defendant fails to cite any authority in support of its bald faced assertions, nor does it cite any authority for its contention that the fairness/prudential factors do not weigh in favor of prospective application of any new decision. As set forth below, because a decision overruling *Hobbs* and *Brown* would create a new principle of law in this state, the Court must look to the following fairness factors, and under settled authority these factors weigh in favor of prospective application. *Pohutski, supra* at 697.

2. A balance of the fairness factors as set forth in *Pohutski* weighs in favor of prospective application of any new rule from this Court.

a. The purpose of the new rule – to correct an alleged error in the interpretation of § 1404 – weighs in favor of prospective application.

In *Pohutski*, this Court found that the purpose of its new rule of law finding that § 7 of the governmental tort liability act did not allow for trespass-nuisance exception, was to correct an error in the interpretation of this statute. *Id.* As a result, the Court held that "[p]rospective application would further this purpose." *Id.*

In this case, the purpose of any decision overruling *Hobbs* and *Brown* would purport to correct this Court's alleged prior misinterpretation of § 1404. Thus, prospective application of the decision would further that purpose. *Pohutski, supra* at 697; *Riley, supra* at 646 (finding that because the purpose of the new rule "was to correct a serious error in the interpretation of a statute under which employees were being paid benefits in excess of the rate intended by the Legislature," the purpose would best be furthered by prospective application).

b. Thirty years of extensive reliance on *Hobbs* and *Brown* weigh in favor of prospective application of any new rule.

The next factor to weigh in determining whether a decision overruling *Hobbs* and *Brown* should be given retroactive or prospective relief is the extent of reliance on these decisions. *In*

Chevron, the Court described this process as "weigh[ing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron*, *supra* at 107. The *Chevron* Court found that consideration of that factor weighed in favor of prospective application of the new rule inasmuch as since the time of the plaintiff's injury, the courts had applied the old law, these decisions represented the law of the land, and "[i]t could not be assumed that [the plaintiff] did or could foresee that this consistent interpretation of the [law] would be overturned. The most he could do was to rely on the law as it then was." *Id.* The Court reiterated its admonition that it "should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Id.*, quoting *Griffin v. Illinois*, 351 U.S. 12, 26 (Frankfurter, J., concurring in judgment).

Similarly, in *Pohutski*, this Court found that because "there ha[d] been extensive reliance on *Hadfield's* interpretation of § 7 of the governmental tort liability act" by the courts, and because "insurance decisions ha[d] undoubtedly been predicated upon this Court's interpretation of § 7 under *Hadfield*," this factor weighed in favor of prospective application of the Court's new rule. *Pohutski*, *supra* at 697.

In this case, for thirty years the courts, road commissions, and litigants alike have relied upon the interpretation of § 1404's 120-day notice requirement as set forth in *Hobbs* and *Brown*: that absent actual prejudice to the defendant, a failure to strictly comply with the notice provision was not fatal to an otherwise timely filed complaint. And indeed, it cannot be assumed that this would not remain the law of the law, particularly when, after *Hobbs* had been in the jurisprudence for twenty years, this Court reaffirmed its holding when it decided *Brown*. Simply because this Court may now disagree with this thirty-year precedent does nothing to change the

fact that when Plaintiff's injury occurred, *Hobbs* and *Brown* were the law of the land, and both Plaintiff and Defendant alike were relying on that fact and acted accordingly. Thus, the reliance factor weighs heavily in favor of prospective application.

c. The effect of any new decision on the administration of justice will be minimized by prospective application.

The administration of justice would be served by prospective application of any new rule from this Court as to the 120-day notice provision of § 1404. Indeed, Plaintiff, and those similarly situated, "would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing" should this Court hold otherwise. *Pohutski*, *supra* at 699. Plaintiff was injured more than five years ago, she provided notice of her injury to Defendant 140 days later, filed this lawsuit over three years ago, survived summary disposition at the trial court, and likewise prevailed at the court of appeals. To hold that her lawsuit is now time-barred for failing to strictly comply with the 120-day notice provision would work an injustice when, at the time of her injury, providing notice, filing her lawsuit, and surviving Defendant's motion for summary disposition, Plaintiff's actions were clearly proper under the law. See *id.* Indeed, "nonretroactive application here simply preserves [Plaintiff's] right to a day in court," *Chevron*, *supra* at 108, thereby rendering this factor in favor of prospective application.

In summary, a decision from this Court overruling *Hobbs* and *Brown* would amount to a new rule of law which, for prudential reasons set forth in *Pohutski*, should only have prospective application.

III. HAVING CONCLUDED THAT *HOBBS* AND *BROWN* SHOULD NOT BE OVERRULED OR, IF SO, THAT THE NEW DECISION SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT, PLAINTIFF'S CLAIM IS NOT BARRED AS UNTIMELY WHERE SHE PROVIDED NOTICE WITHIN 140 DAYS OF HER INJURY AND DEFENDANT SUFFERED NO ACTUAL PREJUDICE, AND WHERE THE CONTENTS OF PLAINTIFF'S NOTICE SATISFIED THE REQUIREMENTS OF MCL 691.1404, IN THAT IT ADEQUATELY APPRISED DEFENDANT OF THE LOCATION OF THE DEFECT AND ALLOWED DEFENDANT TO CONDUCT AN INVESTIGATION, AND WHERE PLAINTIFF'S FOIA REQUEST FOR PHOTOGRAPHS OF THE LOCATION MADE ON THE SAME DAY THAT NOTICE WAS PROVIDED FURTHER ALERTED DEFENDANT TO CONDUCT AN INVESTIGATION AND COLLECT EVIDENCE.

A. Standard of Review

Plaintiff states that the standards of review as set forth in Defendant's brief as to statutory construction, issues of law, and the denial of summary disposition are correct and complete. MCR 7.306(A); 7.212(D)(2).

B. Defendant Suffered No Actual Prejudice by the 20-Day Delay in Receiving Plaintiff's Notice

The trial court properly found that Defendant suffered no actual prejudice by the twenty-day delay in receiving notice of Plaintiff's injury. And the court of appeals properly agreed, opining as follows:

> Defendant specifically claims that it did not have a reasonable opportunity to investigate the defect before it resurfaced the intersection. However, the notice was only 20-days late, and, in any event defendant did not resurface the intersection until after it received the notice. Thus, untimely notice did not actually prejudice defendant. [App. at 144a].

The purpose of the notice provision is to permit the road commission to be apprised of possible litigation against it, and to be able to investigate and to gather evidence quickly in order to evaluate a claim. *Brown, supra* at 362. A party is prejudiced when it is prevented from having a fair trial or is prevented from contesting a relevant issue associated with the case. *Boje v Wayne County General Hosp*, 157 Mich App 700, 708; 403 NW2d 203 (1987).

Here, Plaintiff's twenty-day delay in providing notice will not prevent Defendant from receiving a fair trial, nor did it prevent Defendant from investigating the roadway that caused her fall. Plaintiff provided notice to Defendant on June 26, 2001 by way of an actual notice letter as well as by way of a FOIA request for photo logs of the area in question. Despite having received this notice, and despite having knowledge that it did not have photo logs of the area, Defendant conveniently proceeded to repave the area in question. Thus, any alleged prejudice to Defendant was at its own hand and had nothing to do with the slight delay in receiving Plaintiff's notice. See *Brown, supra*, at 368-369 (holding that the defendant road commission had not established prejudice from the plaintiff's failure to serve notice within the 120-day period because the road commission repaved the road before the expiration of the notice period). This is particularly so where Plaintiff took photographs of the area shortly after the incident occurred.

Defendant relied upon *Blohm v Emmet County Board of County Road Comm'r*, 223 Mich App 383; 565 NW2d 924 (1997), in the trial court in support of its contention that the de minimus delay in Plaintiff's notice resulted in actual prejudice. In *Blohm*, the plaintiff did not file suit against the defendant road commission, thereby providing it notice, until approximately three years after the automobile accident occurred. The Michigan Court of Appeals affirmed the trial court's finding of actual prejudice to the defendant inasmuch as there was no notice given in the period from the time of the accident on May 2, 1992 to the time the suit was filed on April 10, 1995, memories would have faded during this period of time, the vehicle involved in the accident was no longer available for inspection, photographs taken by the Sheriff's Department had been destroyed, and any markings on the roadway would have worn away. *Id.* at 389-391.

The facts of this case clearly are distinguishable from *Blohm*. Notice was provided to Defendant and it was merely twenty days late, Plaintiff's memory was not compromised by this

delay, photographs were taken of the area after the incident which were provided to Defendant, and affidavits of two individuals with personal knowledge of the status of the area were provided to Defendant. (App. at 61a-63a, 73a, 74a). Moreover, Defendant received notice of this possible litigation *prior* to resurfacing the area in question. Thus, any loss of evidence was not due to a lack of notice by Plaintiff, and Defendant cannot therefore demonstrate that it was actually prejudiced. See *Brown*, *supra*, at 368-369.

Defendant nonetheless continues to rely on *Blohm* in its brief to this Court, by claiming that it was prejudiced by way of the *substance* of Plaintiff's notice. That is, Defendant argues that because Plaintiff's notice allegedly did not satisfy the substantive requirements of § 1404, it suffered actual prejudice because it was unaware that this was intersection at issue when it proceeded with the repavement. Defendant's argument is thinly veiled. Indeed, both the trial court and the court of appeals found that Plaintiff's notice met the requirements of § 1404. Plaintiff's notice apprised Defendant of the location of the defect, and a FOIA request sent that same day thereby provided yet further notice to Defendant.

C. Plaintiff's Notice Satisfied Section 1404, Particularly When Considered with the FOIA Request

Section 1404 states that an injured person must provide notice of "the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." MCL 691.1404(1). The purpose of the notice provision is to permit the road commission to be apprised of possible litigation against it, and to be able to investigate and to gather evidence quickly in order to evaluate a claim. *Brown*, *supra* at 362.

Here, Plaintiff's notice set forth the following:

> Please be advised that I have been retained by Mr. [*sic*] Joanne Rowland to investigate and evaluate a claim for personal injuries that arose out of an incident that occurred on February 6,

> 2001. This incident occurred at the intersection of Jennings and Main Street in Northfield Township, County of Washtenaw, State of Michigan. Please be advised that I will continue my investigation and if the same is warranted, will pursue a claim for money damages against the responsible agency for jurisdiction of this roadway. If I do not hear from you within the near future, I will be forced to place this matter into litigation. [App. at 42a].

Thus, the content of Plaintiff's notice adequately fulfilled the letter and the purpose of Section 1404 by apprising Defendant of possible litigation, the location of the defect ("the intersection of Jennings and Main Street in Northfield Township, County of Washtenaw, State of Michigan"), and the injury sustained ("personal injuries"). Because there were no witnesses, none were provided.

In addition, on the same day that this notice was provided, Plaintiff sent Defendant a Freedom of Information Act ("FOIA") request, wherein Plaintiff once again advised Defendant of the location and nature of the injury. (App. at 65a) Plaintiff also requested photo logs of this area thereby providing Defendant further cause to investigate and gather evidence. Thus, Plaintiff not only provided notice pursuant to § 1404, she provided notice by way of her FOIA request which thereby clearly advised Defendant to investigate the scene.

Defendant argues that Plaintiff's notice was too generalized to provide adequate notice under § 1404. However, as the Michigan Court of Appeals properly found, although Defendant objected to the content of the notice as vague, the notice identified the intersection, and if Defendant was able to resurface that intersection, it certainly could have investigated it. (App. at 144a). Defendant had an opportunity to investigate the conditions of the road surface, and simply failed to do so. (*Id.*). Like the court of appeals, this Court should find that Plaintiff's notice met the requirements of § 1404. Indeed, "[m]any other jurisdictions having notice of claim requirements as a prerequisite to filing suit against the state or political subdivisions have adopted substantial compliance in some form." *Carr v Town of Shubuta*, 733 So. 2d 261, 263

(Miss 1999) (collecting cases, including *Blohm, supra*). A notice is sufficient if it substantially complies with the content requirements of the statute. *Collier v Prater*, 544 N.E.2d 497, 498-499 (Ind 1989). Here, Plaintiff's notice substantially complied with the requirements of §1404, Defendant suffered no prejudice by way of the content of this notice, and Defendant's argument to this Court must therefore fail as it did below.

IV. GENUINE ISSUES OF MATERIAL FACT REMAIN FOR TRIAL AS TO WHETHER PLAINTIFF'S INJURY OCCURRED ON THE IMPROVED PORTION OF THE ROADWAY DESIGNED FOR VEHICULAR TRAVEL WHERE PLAINTIFF'S TESTIMONY STATES AS MUCH, AND PHOTOGRAPHS TAKEN OF THE AREA SUPPORT PLAINTIFF'S TESTIMONY, SUCH THAT REASONABLE MINDS COULD FIND IN FAVOR OF PLAINTIFF.

A. Standard of Review

Plaintiff states that the standards of review as set forth in Defendant's brief as to statutory construction, issues of law, and the denial of summary disposition are correct and complete. MCR 7.306(A); 7.212(D)(2).

B. A County Road Commission Owes a Heightened Duty to Pedestrians and is Not Immune from Liability Where a Dangerous Defect is Within the Improved Portion of a Roadway Designed for Vehicular Travel

In *Sebring v City of Berkley*, 247 Mich App 666, 680; 637 NW2d 552 (2001), the Michigan Court of Appeals found that a county road commission is responsible for the maintenance and repair of the crosswalks, as these are included in the improved portion of the roadway. Thus, the court concluded that "when a pedestrian alleges that the dangerous defect was in the improved portion of the highway that also happens to fall within the crosswalk, the plaintiff's claim is not barred by governmental immunity." *Id.* In so concluding, the court stated that it viewed "a crosswalk as being a particular area within the roadbed itself, instead of being a separate installation. Marked or unmarked, we understand a crosswalk to be a path, usually at

the intersection of two roadways, that pedestrians traverse as they cross a street from one side to another." *Id.* at 676.

In *Nawrocki*, this Court held that MCL 691.1402(1) imposes an actionable duty on the state to protect pedestrians from dangerous conditions in the improved portion of the roadway. *Nawrocki, supra* at 162. When the harm is to a pedestrian, the question becomes whether the roadway was "actually unsafe for pedestrian travel." *Id.* at 162 n 20. And when the accident involves a pedestrian, the duty is enhanced:

> We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for *public* travel represents a higher duty of care on the part of the government than repairing and maintaining it for *vehicular* travel. [*Id.* at 172 n 28; emphasis in original.]

Recently, in *Grimes v Mich Dep't of Transportation*, 475 Mich 72, 2006 Mich Lexis 1000 (May 31, 2006), (App. at 6b-18b), this Court held that the shoulder of the highway does not fall within the highway exception to governmental immunity as it is not in the improved portion of the highway intended for vehicular travel.

However, as set forth below, in this case questions of fact remain for trial as to whether the crosswalk in which Plaintiff fell was within the improved portion of the highway designed for vehicular travel, and thus this Court should not disturb the lower courts' holdings.

C. Plaintiff Proffered Sufficient Evidence for Reasonable Minds to Conclude that the Hole in Which She Fell was in the Crosswalk of the Improved Portion of the Roadway Designed for Vehicular Travel Such That Defendant Breached its Heightened Duty

Earl Hughes, Defendant's foreman, identified the area wherein Plaintiff fell as being within the crosswalk and part of the improved portion of the roadway designed for vehicular travel, the maintenance for which Defendant is responsible. Specifically, when questioned as to the area in which Plaintiff alleged to have fallen, Hughes responded as follows:

Q. (Plaintiff's Counsel): And by definition, that would be the area extending parallel across from where the walk bridge is –

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): -- to the other side of Jennings Street?

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): And the area that we're talking about is within the traveled portion of the roadway?

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): And that is an area that's under this jurisdiction as shown in this photograph of the road commission?

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): So the maintenance of the crosswalk in the areas surrounding the crosswalk right-of-way, are the road commission's responsibility?

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): And the road commission is responsible to maintain crosswalks . . . as part of the right-of-way for the safety of motor vehicle traffic?

A. (Hughes): Correct.

Q. (Plaintiff's Counsel): As well as pedestrian traffic?

A. (Hughes): Correct. [App. at 76a].

Significantly, Defendant offered nothing to counter Hughes' testimony. Rather, on appeal to this Court Defendant argues that no genuine issue of material fact remains for trial that the hole in which Plaintiff fell was not in the crosswalk on the improved portion of the highway designed for vehicular travel. Defendant contends that, based on photographs taken of the scene, Plaintiff's testimony that the hole was in the crosswalk was actually identifying an area adjacent

thereto. Such factual determinations are for the jury as a review of these photographs does not, as a matter of law, preclude a finding in favor of Plaintiff. [App. at 38a, 40a, 61a, 62a, 63a].

As the court of appeals properly concluded:

> after looking at the photographs submitted by the parties, we conclude that reasonable minds could disagree on whether water ad accumulated in the marked crosswalk. Because the facts regarding the location of the alleged hole are in dispute, we cannot determine at this time whether as a matter of law defendant is immune from liability on the ground that the alleged hole was not in the improved portion of the roadway. Therefore, the trial court correctly denied summary judgment on this basis. [App. at 145a].

Defendant's arguments to this Court fail to indicate why a question of fact does not remain for trial as to whether the area in which Plaintiff fell was within the improved portion of the highway designed for vehicular travel (the crosswalk over which vehicles traverse when traveling). It is within the province of the jury to weigh the credibility of testimony and assess the evidence, and this Court must not usurp that role here as suggested by Defendant. See, e.g. *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). Thus, Defendant's claim to this Court must fail as it did below.

CONCLUSION AND RELIEF REQUESTED

The thirty-year precedent embodied in *Hobbs* and *Brown* has been relied upon and consistently applied by litigants, road commissions and the courts. To deviate from the holding of these cases as to the 120-day notice provision of § 1404 would cause more harm than good, and for these reasons, as well as for all of the reasons set forth above, this Court should not overrule *Hobbs* and *Brown*. However, should this Court disagree, its decision would create a new rule of law that should have only prospective application when considering prudential factors such as reliance and the administration of justice.

Upon affirming *Hobbs* and *Brown*, or upon having any new rule be limited to prospective application, for the above-stated reasons, this Court should affirm the lower courts' rulings that Plaintiff properly provided notice to Defendant as required by § 1404, and that questions of fact remain for trial as to whether her injury occurred in the improve portion of the highway designed for vehicular travel.

Thus, Plaintiff respectfully requests that this Honorable Court affirm the lower courts' rulings.

Respectfully submitted,

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